HADLAND ARTHUR JOHN & ANOR A

v.

AUDRA ELAINE GOMEZ

HIGH COURT MALAYA, KUALA LUMPUR B
HARMINDAR SINGH DHALIWAL JC
[CIVIL SUIT NO: S4-22-159-2007]
30 JUNE 2009

CONTRACT: *Agreement - Sale and purchase agreement - Application to rescind - Whether property unfit for occupation - Whether plaintiffs entitled to terminate SPA - Claim for refund of deposit, damage to personal effects and medical expenses - Whether allowed* C

CONTRACT: *Agreement - Tenancy agreement - Parties entered into tenancy agreement pending completion of sale and purchase agreement - Application to rescind - Whether property unfit for occupation - Claim for refund of deposit, damage to personal effects and medical expenses - Whether allowed - Breach of tenancy agreement - Whether plaintiff entitled to claim for alternative accommodation* D

E

By a sale and purchase agreement ('SPA'), the plaintiffs, husband and wife, agreed to purchase from the defendant a property ('the property') for the purchase price of RM1,100,000. The plaintiff paid a total of RM110,000 representing 10% of the purchase price as deposit ('the deposit.') Pending completion of the SPA, F the plaintiffs entered into a tenancy agreement with the defendant ('tenancy agreement'). The defendant agreed to let the said property to the plaintiff at a monthly rental of RM3,000 until completion of the SPA or six months from the date of the tenancy agreement, whichever was earlier. However, while the plaintiffs G were residing in the property, part of the plastic ceiling in the master bedroom of the property collapsed. The second plaintiff and her daughter, who were sleeping in the bedroom at the time, escaped injury. The plaintiffs then moved out of the property. Subsequently, by a letter dated 29 September 2006, the plaintiffs, H through their solicitors, sought to rescind the SPA and the tenancy agreement and made several demands which the defendant resisted. The plaintiffs contended that the property was unfit for occupation/use and were therefore entitled to terminate the SPA. The plaintiffs also claimed for refund of deposit, costs for I alternative accommodation, packing and storing charges, damage to personal effects, medical expenses for the second plaintiff and legal

fees and expenses. The defendant disputed the right to terminate the SPA and claimed that the damage to the property was rectified and was fit for occupation/use.

Held:

(1) Clause 12 of the SPA would apply in the event the property was damaged or destroyed by some external factor or cause and not by some defect in the property itself. Examples of external causes would be damage caused to the property by third parties including acts of God. Such an external cause would certainly be beyond the reasonable control of the parties rendering the property unfit for occupation. A defect in the property, as was the case here, would be insufficient to rescind the SPA. Furthermore, the defect in the instant case was only temporary and not sufficiently permanent. (para 20)

(2) There was no injustice here as having made the bargain in the SPA, the plaintiffs were obliged to honour it. As they did not wish to live there anymore, and justifiably so, they could have sold off the property. Having signed the SPA, it was their duty as well to find out the measures taken to restore the property and to determine if the property was fit for occupation. The letter by the engineers certifying that the property was structurally safe was forwarded to the plaintiffs' solicitors. The plaintiffs could not now complain that they were not informed of the outcome of the repairs and restoration works. In the circumstances, the plaintiffs were not entitled to rescind the SPA by virtue of cl. 12 of the SPA. (paras 21 & 22)

(3) As long as the deposit paid was a true deposit or consisted of an amount that was reasonable, in the event of a breach of contract, the deposit could be forfeited without the need of proving any damage that had been suffered. In other words, s. 75 of the Contracts Act 1950 did not apply to the forfeiture of true or reasonable deposits. In the instant case, the sum of RM110,000 was a deposit. The purpose was to bind the bargain entered with the fear of forfeiture as the motive to guarantee performance. The forfeiture of a 10% deposit was reasonable, not harsh or extortionate. It was usual and customary to have as the amount of deposit 10% of the purchase price *Linggi Plantations Ltd v. Jagatheesan; Master Strike Sdn Bhd v. Sterling Heights Sdn Bhd*; *Selva Kumar a/l*

Murugiah v. Thiagarajah a/l Retnasamy. The plaintiffs were constrained from seeking a refund of the deposit as the defendant was perfectly within her rights to forfeit the deposit. (paras 27 & 28)

(4) The claim for damage to the personal effects must be disregarded since negligence was not pleaded and no particulars were given. They could not rely on the SPA. Neither did they assert any breach of the tenancy agreement conceivably for the reason that the property was also let to the plaintiffs on an 'as is where is' basis under the tenancy agreement. The claims for medical expenses and legal fees also suffered from a similar predicament. The claim for legal fees could only arise if the SPA had been properly rescinded. The claim for medical expenses was in any case tenuous as the second plaintiff had a pre-existing medical condition. There was insufficient evidence to suggest that the expenses incurred arose from the shock and trauma that she may have suffered. These claims were therefore disallowed. (paras 29 & 30)

(5) When the property became unsafe for occupation, there was a fundamental breach of the tenancy agreement. The plaintiffs could no longer use the property as tenants, which use was the primary object of the tenancy agreement. They were therefore entitled to vacate the property and claim for alternative accommodation and packing and storage charges. Based on the oral and documentary evidence adduced, the total cost of alternative accommodation for the months of August and September 2006 was RM19,018.53 and the packing and storage charges were 13,100. The total sum came to RM32,118.53. (para 31)

[Judgment for the plaintiffs against the defendant for the sum of RM32,118.53 together with interest at 8% per annum from the date of the writ of summons till realization. The plaintiffs entitled to costs.]

Case(s) referred to:

Bhai Panna Singh v. Bhai Arjun Singh AIR [1929] PC 179 ***(refd)***
Chua Moh Huat, Dennis v. Harvester Baptist Church Ltd [1992] 1 CLJ 229; [1992] 4 CLJ (Rep) 258 CA ***(refd)***
Forbes v. Git [1922] 1 AC 256 ***(refd)***
Hoskins v. Woodham [1938] 1 All ER 692 ***(refd)***
Howe v. Smith [1884] 27 Ch D 89 ***(refd)***
Inland Revenue Commissions v. Raphael [1935] AC 96 ***(refd)***
Linggi Plantations Ltd v. Jagatheesan [1971] 1 LNS 66 PC ***(refd)***

A *Master Strike Sdn Bhd v. Sterling Heights Sdn Bhd [2005] 2 CLJ 596 CA* ***(refd)***
Miller v. Cannon Hill Estates Ltd [1931] 2 KB 113 ***(refd)***
Perry v. Sharon Development Co Ltd [1937] 4 All ER 390 ***(refd)***
Reliance Shipping & Travel Agencies v. Low Ban Siong [1996] 2 CLJ 960 CA ***(refd)***
B *Selva Kumar Murugiah v. Thiagarajah Retnasamy [1995] 2 CLJ 374 FC* ***(refd)***
SS Maniam v. The State of Perak [1956] 1 LNS 112 HC ***(refd)***
Wearne Bros (M) Ltd v. Jackson [1966] 1 LNS 210 HC ***(refd)***
Yien Tieh Commercial Bank Ltd v. Kwai Chung Cold Storage Co Ltd [1989] 2 HKLR 639 PC ***(refd)***
C

Legislation referred to:
Contracts Act 1950, s. 75

Other source(s) referred to:
D Kim Lewison, *The Interpretation of Contracts*, Sweet and Maxwell, 2004 edn, pp 299, 309

For the plaintiffs - Ong Kim Buai; M/s Dorairaj, Low & Teh
For the defendants - Ivan YF Loo (YH Lim with him); M/s Skrine

E *Reported by Suhainah Wahiduddin*

JUDGMENT

F **Harmindar Singh Dhaliwal JC:**

[1] The plaintiffs are husband and wife. By a sale and purchase agreement ("SPA") dated 3 April 2006, the plaintiffs agreed to purchase from the defendant a property known as Unit 3.02 3rd Floor, Tara Condominium, No. 33, Jalan Ampang Hilir, Kuala
G Lumpur ("the property"). The purchase price was RM1,100,000. The plaintiff paid a total of RM110,000 representing 10% of the purchase price as deposit ("the deposit").

[2] Pending completion of the SPA, the plaintiffs entered into a
H tenancy agreement dated 1 March 2006 with the defendant ("tenancy agreement"). The defendant agreed to let the said property to the plaintiff at a monthly rental of RM3,000 until completion of the SPA or six months from the date of the tenancy agreement, whichever is the earlier.
I

[3] However, things did not quite work out as the parties had anticipated. On 17 July 2006, part of the plastic ceiling in the master bedroom of the property collapsed. It was fortunate that the 2nd plaintiff and her daughter, who were sleeping in the bedroom at the time, escaped injury. The plaintiffs then moved out of the property. By a letter dated 29 September 2006, the plaintiffs, through their solicitors, sought to rescind the SPA and the tenancy agreement and made several demands which the defendant resisted.

[4] The plaintiffs are contending that the property is unfit for occupation/use and are therefore entitled to terminate the SPA. They are claiming for the following:

(i) Refund of the deposit:	RM110,000
(ii) Costs for alternative accommodation:	RM19,018.53
(iii) Packing and Storage Charges:	RM13,100
(iv) Damage to personal effects:	RM25,394.56
(v) Medical expenses for 2nd plaintiff:	RM4,974.40
(vi) Legal fees and expenses:	RM12,296

[5] The defendant is disputing the right to terminate the SPA and claims that the damage to the property was rectified and it is fit for occupation/use.

[6] Were the plaintiffs entitled to rescind the SPA? This is the pivotal question. Reasons for the termination of the SPA were given in the letter dated 29 September 2006 by which the plaintiffs sought to rescind the SPA. Reasons for doing so were also given by the plaintiffs in their testimony in court. The plaintiffs had intended to live in the property concerned and make it a family home. However, part of the ceiling collapsed in the master bedroom and there were hairline cracks in the ceilings of the other bedrooms as well. The plaintiffs and their daughter suffered shock and trauma at this turn of events. Their dream of a family home lay literally in tatters judging by the photographs of the bedroom after the incident. The plaintiffs then had serious misgivings about the safety of the property. I had no doubt that anyone in their position would think very hard and long about living in the property after what they had gone through.

[7] Considering these circumstances, did they have the right to rescind? The general principle governing the purchase of landed properties is that the maxim "caveat emptor" applies to the purchase of a completed house. There is no warranty that it is fit for habitation. As for physical defects, the vendor is under no duty to disclose any defects and makes no warranty about the state and condition of the property being sold. The purchaser must satisfy himself on these matters (*Chua Moh Huat, Dennis v. Harvester Baptist Church Ltd* [1992] 1 CLJ 229; [1992] 4 CLJ (Rep) 258; citing *Miller v. Cannon Hill Estates Ltd* [1931] 2 KB 113 and *Hoskins v. Woodham* [1938] 1 All ER 692).

[8] This principle was further reiterated in *Perry v. Sharon Development Co Ltd* [1937] 4 All ER 390 by the English Court of Appeal where Sir Wilfred Greene MR observed as follows at p. 392:

> It is of course well settled that a vendor of a completed house, in respect of which there is no work going on and no work to be done, does not, in the absence of some express bargain, undertake any obligation with regard to the condition of that house. It is further well settled that, quite apart from obligations in contract, there is no obligation in tort lying upon him in respect of want of proper care in the construction or in the condition of the house he is selling.

[9] What is noteworthy from the case authorities is that if there is to be a warranty or a condition, then the purchaser must expressly stipulate for it (*Chua Moh Huat, Dennis v. Harvester Baptist Church Ltd, supra*; *Miller v. Cannon Hill Estates Ltd, supra*).

[10] In the instant case, there was no such stipulation in the SPA. In fact, a close reading of cls. 11.2 and 12 suggests quite the contrary. For convenience, the relevant part of cl. 11.2 is reproduced as follows:

> The Purchaser hereby confirms, declares and agrees that:
>
> (a) the Purchaser has inspected the Property and is satisfied with the condition, state, nature and character of the Property.
>
> (b) the Purchaser is purchasing the Property on an "as is where is" basis;
>
> (c) the Vendor has not made any representation or warranty as to the condition, state, nature and character of the Property.

And Clause 12 reads:

> 12. Damage to Property
>
> If at any time before full payment of the Purchase Price, the Property is damaged or destroyed by any cause beyond the reasonable control of the Parties hereto so as to become unfit for occupation/use, then, either Party hereto shall be entitled to rescind this Agreement by notice in writing to the other Party whereupon the provisions of Clause 6 shall apply *mutatis mutandis*.

[11] Dealing first with cl. 11.2 of the SPA, it would appear that the parties had set out their intentions quite definitively. In particular, cl. 11.2 (b) states that the property was purchased on an "as is where is" basis. This clause excludes any warranty or condition as to the state and condition of the property and also in consequence its fitness for habitation (*Chua Moh Huat, Dennis v. Harvester Baptist Church Ltd, supra*). Clauses 11.2 (a) and (c) therefore seem superfluous but I suppose they were included for the avoidance of any doubt whatsoever.

[12] Coming now to cl. 12 of the SPA, the plaintiffs assert that the fact of the collapsed ceiling itself is sufficient to show that the property is unfit for occupation. In this regard, the evidence was clear enough. Part of the ceiling in master bedroom had collapsed. There were cracks in the other bedrooms. I don't think it can be seriously argued otherwise that at the time, the property was unsafe. The plaintiffs were quite rightly advised to vacate the premises which they did because of their concerns about their own safety.

[13] However, the evidence adduced did not suggest that there were structural cracks. These cracks were really the cracks in the cement sand plaster. This is supported by the certification by TY Lin International Sdn Bhd, the original civil and structural consultants for the Tara Condominium project. By their letter dated 8 August 2006, they certified that the structural integrity of the ceiling slab remains uncompromised and is fit for its intended purpose. I think their certification carries greater weight than the plaintiffs' witnesses as they were more qualified and also familiar with the structure of the building. As it turned out, the ceilings were eventually rectified with the installation of fibrous plaster ceilings. And since the plaintiff's refused to continue with the SPA, the property in fact came to be later tenanted for a period of two years commencing from 17 March 2007.

[14] In summary, what this means is that the property was certainly unsafe for a certain time period but when the plaster ceilings were replaced and the property restored, it was certainly, to my mind, fit for occupation. I cannot imagine the other occupants of the condominium as well as the defendant's new tenant occupying their properties if it was not the case.

[15] The plaintiffs' argument is that as the property became unfit for occupation when the ceilings collapsed, the provisions of cl. 12 will apply. They further contend that even if it does not, the question of repairs or rectification works is irrelevant as they were not made aware of it. It was submitted that the circumstances surrounding the plaintiff's decision of terminating the SPA should be considered.

[16] No doubt the plaintiffs, given the incident of the collapsed ceiling, would rightfully say that it is no longer fit for their occupation as it would be hard to get over the shock and trauma if they had to live there again. But I think cl. 12 must be considered objectively. The principle of the common law has been to adopt an objective standard of construction and to exclude general evidence of the actual intention of the parties. The reason for this is that if it is not construed in this manner, there will be no certainty to the agreements that the parties have recorded for themselves (*Inland Revenue Commissions v. Raphael* [1935] AC 96).

[17] Furthermore, cl. 12 must be read together with cl. 11.2 to arrive at a consistent and harmonious interpretation of the SPA. So it would be untenable to suggest that there is no warranty or condition as to fitness for occupation of the property under cl. 11.2 but such a warranty or condition exists under cl. 12. On the question of interpretation, the courts will be reluctant to hold parts of a contract as inconsistent with each other and will give effect to any reasonable construction which harmonises such clauses (Kim Lewison, *"The Interpretation of Contracts"* Sweet and Maxwell, 2004 edn at p. 309).

[18] In the Privy Council decision in *Yien Tieh Commercial Bank Ltd v. Kwai Chung Cold Storage Co Ltd* [1989] 2 HKLR 639 PC, Lord Goff of Chievely explained the general approach in the following terms:

> Their Lordships wish to stress that to reject one clause in a contract as inconsistent with another involves a rewriting of the contract which can only be justified in circumstances where the two clauses are in truth inconsistent. In point of fact, this is likely to occur only where there has been some defect of draftsmanship …

[19] In the event that there is such inconsistency, the later clause which destroys the effect of the earlier clause is to be rejected as repugnant and the earlier clause prevails. If, however, the later clause can be read as qualifying rather than destroying the effect of the earlier clause, then the two are to be read together and effect given to both (Kim Lewison, *"The Interpretation of Contracts"*, *supra* at 299; *Forbes v. Git* [1922] 1 AC 256).

[20] In my assessment, in order to achieve a consistent interpretation, cl. 12 will apply in the event the property is damaged or destroyed by some external factor or cause and not by some defect in the property itself. Examples of external causes would be damage caused to the property by third parties including acts of God. Such an external cause would certainly be beyond the reasonable control of the parties rendering the property unfit for occupation. A defect in the property, as was the case here, would be insufficient to rescind the SPA. Furthermore, the defect in the instant case was only temporary and not sufficiently permanent.

[21] There is no injustice here as having made the bargain in the SPA, the plaintiffs were obliged to honour it. As they did not wish to live there anymore and justifiably so, they could have sold off the property. Having signed the SPA, it was their duty as well to find out the measures taken to restore the property and to determine if the property was fit for occupation. The letter of 8 August 2006 by the engineers certifying that the property was structurally safe was forwarded to the plaintiffs' solicitors. I think in the end, with the events of 17 July 2006 still fresh in their minds, the plaintiffs simply did not want to know about the property and were quite adamant in terminating the SPA. They cannot now complain that they were not informed of the outcome of the repairs and restoration works.

[22] In the circumstances, I would hold that the plaintiffs were not entitled to rescind the SPA by virtue of cl. 12 of the SPA. That being the case, were the plaintiffs still entitled to a refund of the deposit? The plaintiffs referred to s. 75 of the Contracts Act

A 1950 to make the point. They claim that this provision obliges the defendant to prove that the deposit sum of RM110,000 was reasonable compensation for the defendant's loss due to the plaintiffs' wrongful termination of the SPA. To determine this issue, it may be convenient at the outset to refer to the s. 75 itself
B which reads as follows:

> When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual
C damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for

D **[23]** The effect and extent of s. 75 has been settled through a host of authorities beginning with *Bhai Panna Singh v. Bhai Arjun Singh* AIR [1929] PC 179 and then *SS Maniam v. The State of Perak* [1956] 1 LNS 112, *Wearne Bros (M) Ltd v. Jackson* [1966] 1 LNS 210, *Linggi Plantations Ltd v. Jagatheesan* [1971] 1 LNS 66,
E *Selva Kumar Murugiah v. Thiagarajah Retnasamy* [1995] 2 CLJ 374 and *Reliance Shipping & Travel Agencies v. Low Ban Siong* [1996] 2 CLJ 960. What can be gathered from these cases as to the effect of s. 75 is simply this. Where a breach of contract has occurred and a sum is fixed in the contract, the party alleging the
F breach is not entitled to recover this sum without also proving the damages suffered.

[24] At first sight, the argument raised by learned counsel for the plaintiffs appears compelling. It is that evidence must be given by the defendant that she suffered damage before the deposit can be
G forfeited. However, unfortunately for the plaintiffs, there is clear authority that a distinction must be drawn between earnest money or deposit and a penalty.

[25] In particular, the Privy Council in *Linggi Plantations Ltd v.*
H *Jagatheesan*, *supra*, pointed out:

> ... the law relating to the forfeiture of deposits has always been treated as entirely distinct and separate from the learning introduced into English law by the distinction between liquidated damages based on a genuine pre-estimate of the loss likely to be
I suffered in event of a breach and a penalty where equity came to

> the rescue of the obligee on a bond or other contractual provision imposing a penalty under a contract where the penalty exceeded the actual damage. ...
>
> But the law relating to deposits, as Fry LJ pointed out in *Howe v. Smith*, has a much longer pedigree, being imported from the civil law at least as early as Bracton, and, assuming the deposit or earnest money to be reasonable, forfeiture of a deposit was not normally the subject of equitable relief.

[26] And the Privy Council then held:

> It follows, therefore, that, once it is decided that the construction of the contract is such that the sum of $377,500 was paid as a true deposit, that is, on the same terms as the deposit as in *Howe v. Smith*, and was thus to be liable to forfeiture under the contract, in case of failure by the purchaser to complete, section 75 of the Contracts (Malay States) Ordinance can have no application when the contract is properly terminated and the deposit is forfeited whether or not damage is proved.

[27] It is therefore now settled that as long as the deposit paid is a true deposit or consists of an amount that is reasonable, in the event of a breach of contract, the deposit can be forfeited without the need of proving any damage that has been suffered. In other words, s. 75 of the Contracts Act 1950 does not apply to the forfeiture of true or reasonable deposits.

[28] In the instant case, there can be little doubt that the sum of RM110,000 was a deposit. The purpose was to bind the bargain entered with the fear of forfeiture as the motive to guarantee performance (see *Howe v. Smith* [1884] 27 Ch D 89). I also do not see the forfeiture of a 10% deposit as being unreasonable much less harsh or extortionate. It is usual and customary to have as the amount of deposit 10% of the purchase price (see *Linggi Plantations Ltd v. Jagatheesan, supra; Master Strike Sdn Bhd v. Sterling Heights Sdn Bhd* [2005] 2 CLJ 596; *Selva Kumar Murugiah v. Thiagarajah Retnasamy*, *supra*). For these reasons, the plaintiffs were constrained from seeking a refund of the deposit as the defendant was perfectly within her rights to forfeit the deposit.

[29] I come now to the other claims. It was not clear to me how the plaintiffs could claim for the damage to the personal effects. They could not rely on the SPA. Neither did they assert any breach of the tenancy agreement conceivably for the reason that the property was also let to the plaintiffs on an "as is where

A is basis" under the tenancy agreement. The only cause of action was probably negligence since there was a plea of *res ipsa loquitur*. However, since negligence was not pleaded and no particulars were given, this claim must be disregarded. In any case, I fail to see how the defendant herself was in any way negligent for the B collapsed ceiling. If there was to be any cause of action in negligence, it could only have been mounted against the persons who installed the plaster ceiling.

[30] The claims for medical expenses and the legal fees also C suffered from a similar predicament. The claim for legal fees could only arise if the SPA had been properly rescinded. The claim for medical expenses, in my view, was in any case tenuous as the 2nd plaintiff had a pre-existing medical condition. There was insufficient evidence to suggest that the expenses incurred arose from the D shock and trauma that she may have suffered. These claims were therefore disallowed.

[31] This leaves only the claim for costs of alternative accommodation and packing and storage charges. Although the E plaintiffs' statement of claim is lacking in precision in this regard, this claim I believe can only arise if there was a fundamental breach of the tenancy agreement. Although the property was also let to the plaintiffs on an "as is where is basis", I considered that when the property became unsafe for occupation, there was F certainly a fundamental breach of the tenancy agreement. The plaintiffs could no longer use the property as tenants, which use was the primary object of the tenancy agreement. They were therefore entitled to vacate the property and claim for alternative accommodation and packing and storage charges. Based on the G oral and documentary evidence adduced, the total cost of alternative accommodation for the months of August and September 2006 was RM19,018.53 and the packing and storage charges was RM13,100. The total sum came to RM32,118.53.

[32] In coming to this view, I have not overlooked the H contention of the defendant in that there was an offer of alternative accommodation by the defendant and the law requires the plaintiffs to mitigate the damage. However, I accepted the evidence that by the time the offer came, the plaintiffs were already staying somewhere else. In other words, the offer came I too late. The defendant's contention also suffers from another

infirmity. There is no evidence that the offer of alternative accommodation would have cost less than what the plaintiffs incurred and are now seeking. For these reasons, I am unable to see any merit in the defendant's contentions.

[33] In the circumstances, I would allow judgment for the plaintiffs against the defendant for the sum of RM32,118.53 together with interest at 8% per annum from the date of the writ of summons till realization. The plaintiffs are also entitled to costs.